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In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

DR. ARNOLD M. LANDSBOROUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

The petitioner, Dr. Arnold M. Landsborough, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on July 12, 1948 affirming the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is attached to and made a part of the transcript of proceedings of said Court for certiorari application. See certified copy of record of proceedings of the case, page 77.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 12, 1948 upon denial of Appellant's Petition for Re-Hearing. Jurisdiction of this Court is invoked under Sections 237 (b) and 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; also Act of March

8, 1934 and Rule XI of the Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt in Criminal Cases brought in the District Courts of the United States and in the Supreme Court of the District Court of Columbia, promulgated May 7, 1934. 292 U. S. 661, 666.

This Petition has been filed within the statutory period of thirty days after judgment, provided for by the Act of March 8, 1934 and Rule XI of the Rules of Practice and Procedure above mentioned.

STATUTE INVOLVED.

Paragraph (a) of Section 2553, Title 26, U. S. C. A. is copied in the Statement of Facts, together with the indictment.

QUESTIONS PRESENTED.

First.

Should the Trial Court have withdrawn the testimony from the Jury and have discharged the defendant, or have instructed the Jury to discharge the defendant, there being no evidence to prove the allegations of the indictment.

Second.

Should the conviction in this case be reversed since the evidence fails to show the issue and use of a search warrant and warrant to arrest.

STATEMENT OF FACTS.

Petitioner herein, Dr. Arnold M. Landsborough, was tried and convicted in the District Court of the United States, Northern District of Ohio, Eastern Division, Judge Paul Jones presiding, on the following indictment:

> "On or about January 20, 1947, in the Eastern Division of the Northern District of Ohio, Dr. Arnold M. Landsborough did knowingly, willfully, unlawfully, and feloniously purchase a derivative of opium, to-wit:

forty (40) one-quarter grain Morphine Sulphate tablets, the same not being in the original stamped package, in violation of Section 2553, Title 26, United States Code."

This indictment was based upon Section 2553 Title 26, U. S. C. A.

"Packages."

"(a) General requirements. It shall be unlawful for any person to purchase, sell, dispense or distribute any of the drugs mentioned in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by Sections 3221 and 3220 shall be prima facie evidence of liability to such special tax * * *."

At all times mentioned herein, Dr. Arnold M. Landsborough, Petitioner herein, was a duly licensed and practicing physician and surgeon located in the Village of Garrettsville, Ohio and on January 20, 1947 was recuperating in his home there from disability and illness resulting from a fractured hip bone. While Dr. Landsborough was in the kitchen of his home on the afternoon of the above date, two Federal Narcotic Agents walked in, questioned and arrested him and confiscated a small clear glass bottle which the Agents claimed contained approximately 40 Morphine tablets and also confiscated his automobile. No search warrant or warrant for the arrest were produced or used and no receipt was given Dr. Landsborough for the property taken.

To the above indictment, Petitioner pleaded "Not guilty."

At the trial, the Agents testified that they had under investigation, one George Bishop, and had followed him

while he was operating Petitioner's automobile to the home of Petitioner.

Agent McDonald testified that Bishop told him he had gotten some drugs for himself on this trip. (Record page 11.)

Agent Ripberger testified that the alleged drugs so confiscated were not part of the drugs obtained at the drugstore in Cleveland by Bishop on that day. (Record page 25.)

At the end of the testimony on behalf of the Respondent, Petitioner moved that the Court withdraw the testimony from the Jury and instruct it to return a verdict for the Petitioner on the ground that the allegations of the indictment had not been proven. (Record page 30.)

The Trial Court took the above motion under advisement with this statement—"the indictment does however charge purchase. Up to date, there is not any evidence of purchase." (Record page 31.)

The defense was then required to proceed and Petitioner's evidence was to the effect that the drugs confiscated were legally obtained by his wife upon a prescription from a Dr. Deyell, his attending physician.

Dr. Landsborough denied that he had received narcotics from or through George Bishop. His further testimony, supplemented by that of Mrs. Catherine Landsborough, his wife, was to the effect that the morphine tablets prescribed for him by Dr. Deyell, on January 13, 1947, and which Mrs. Landsborough secured in the local drug store, had been removed by her from the original stamped cardboard package to prevent breakage when being carried, as they were preparing to leave on a trip to Florida.

Two prominent local business men testified as to Petitioner's good character and reputation.

At the close of all the evidence, counsel for Petitioner renewed his motion that the Court withdraw the testimony from the Jury and discharge the defendant for the reason that the indictment charged him with the purchase of mor-

phine tablets, whereas, the Respondent had failed to offer any proof of any purchase by said Petitioner. This motion the Court overruled and exceptions were taken.

After arguments of counsel and the Court's charge, the case was submitted to the Jury which returned a verdict of "Guilty." Petitioner was sentenced to imprisonment for a period of fifteen months. No costs were assessed.

From this verdict and judgment, Dr. Landsborough appealed to the Circuit Court of Appeals, Sixth Circuit, which affirmed the judgment of the District Court.

REASONS WHY CERTIORARI SHOULD BE GRANTED.

(1) Petitioner was indicted and convicted on a charge of purchase of contraband and Respondent offered no evidence to sustain that charge.

(2) The phrase in the Statute to the effect that possession of contraband is "prima facie evidence of the violation" was improperly given the same effect by the Trial Court as if Respondent had offered evidence of purchase.

(3) The presumption created in the statute involved, by the alleged possession of contraband, merely required Petitioner to explain that possession, and the explanation offered by Petitioner did not strengthen Respondent's case, but controverted it so that there was no evidence of Petitioner's guilt to submit to the Jury and the Court should have granted Petitioner's motion for judgment.

(4) The Circuit Court of Appeals for the Sixth Circuit in this case has decided an important question of Federal criminal law, namely, the right of Government Agents to enter and search a home and to arrest without warrant therefor, all in probable conflict with the decisions of this Court in the case of *United States v. DiRe*, 332 U. S. 581; *Anne Johnson v. United States of America*, #329, October Term, 1947, decided February 2, 1948 by this Court; *Jack Trupiano, et al. v. United States of America*,

#427, October Term, 1947, decided June 14, 1948 by this Court.

Respectfully submitted,

HAL H. GRISWOLD,
Counsel for Petitioner,
Dr. Arnold M. Landsborough.

GRISWOLD, LEEPER, MILLER & CORRY,
WAYNE E. MILLER,
Of Counsel.

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1948.

No. .....

DR. ARNOLD M. LANDSBOROUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

FIRST QUESTION.

Should the Trial Court have withdrawn the testimony from the Jury and have discharged the defendant, or have instructed the Jury to discharge the defendant, there being no evidence to prove the allegations of the indictment?

A bottle of Morphine Sulphate tablets was produced by the Respondent at the trial, identified, offered and received as Exhibit. The Respondent's own witness testified that the contents of that bottle were not purchased by George Bishop whom Agents had followed to Petitioner's home.

There was not one word of testimony offered at the trial by the United States relating to the source of the morphine sulphate tablets in question. All that the Government can rely on is the wording of the Statute to the effect that:

"the absence of appropriate tax paid stamps for any of the aforesaid drugs shall be prima facie evidence of a

violation of this subsection by the person in whose possession same may be found."

The effect of the Statute referring to "prima facie evidence of a violation" is merely to raise a presumption that there has been a violation. This places upon the accused the necessity of going forward with his evidence but the burden of proof does not shift to the accused. This is the rule of law in Ohio. See *Farm Bureau Mutual Automobile Insurance Co. v. The Alms & Doepke Co.*, 30 O. O. 387 at page 389, decided in 1944. It is also the general rule elsewhere. 20 *Am. Jur.* 136, Section 133, states as follows:

> "A presumption of law which arises upon the pleading or during the course of the trial after the introduction of evidence may aid a party in discharge of the burden of proof cast upon him and shift to his adversary the burden of explanation or of going on with the case, but does not, as a general rule, shift the burden of proof; a presumption simply changes the order of proof to the extent that one upon whom it bears must meet or explain it away, and when such explanation is made, the duty is upon the plaintiff to take up the burden which the law cast upon him and sustain the issue by a preponderance of the evidence. A presumption which operates in the plaintiff's favor casts upon the defendant the burden of producing evidence to meet the plaintiff's *prima facie* case, and not the burden of proof in the sense of the risk of non-persuasion, which remains with the plaintiff throughout the trial."

The Supreme Court of the United States refers to the Statute in question in the case at bar in the case of *Casey vs. U. S.*, 276 U. S. 413 (1927). At page 418 in referring to the presumption arising from the wording of this specific Statute, the Court states:

> "Furthermore there are presumptions that are not evidence in a proper sense but simply regulations of the burden of proof. The statute here talks of *prima facie* evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime the statute creates."

According to the *Casey* case, the burden was upon Dr. Landsborough to explain and justify the possession of the morphine sulphate tablets. This Dr. Landsborough did by his own testimony and the testimony of Mrs. Landsborough.

After this evidence was given, there was no rebuttal thereof nor any other evidence to overcome it. All the prosecution had was a presumption and it was met by positive testimony offered by the defense. 17 *O. J.* 146, Section 116 states as follows:

> "If that *prima facie* case is met by evidence tending to negative it, it then becomes the duty of the party upon whom the true burden lies to strengthen the *prima facie* case or overcome the proof offered."

When the accused produced evidence which reasonably tended to show that the fact was not as presumed, the presumption became insufficient to support a conviction. A case directly in point which expresses the rule as to presumption is that of *Tyrrell vs. Prudential Insurance Co.*, 109 Vt. 6 (1937).

At page 403 the Court states:

> "A disputable presumption is a rule of law to be laid down by the Court, which shifts to the party against whom it operates the burden of evidence, merely. It points out the party on whom lies the duty of going forward with evidence on the fact presumed. And when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the office of the presumption is performed, and the fact in question is to be established by evidence as are other questions of fact, without aid from the presumption, which has become *functus officio*. To translate this statement into the language of this Court, all such presumptions are locative, merely. A presumption, of itself alone, contributes no evidence and has no probative quality. It takes the place of evidence, temporarily at least, but if and when enough rebutting evidence is admitted to make a question for the Jury on the fact involved, the presumption disappears and goes for naught. In such a case the

presumption does not have to be overcome by evidence; once it is confronted by evidence of the character referred to, it immediately quits the arena."

The presumption relied upon by the prosecution after all is only a presumption and has no probative value whatsoever. It is not evidence. There was no evidence of purchase as the Trial Court stated. Against that presumption, the accused had in his favor a presumption also, a presumption of innocence. He also produced positive, undenied evidence which overcame the presumption raised by the statute. This being true, the defense respectfully maintains that not only was there insufficient evidence to find the accused guilty beyond a reasonable doubt but there was no evidence whatsoever to support the conviction.

SECOND QUESTION.

Should the conviction in this case be reversed since the evidence fails to show the issue and use of a search warrant and warrant to arrest?

In Volume 3, *Am. Jur.*, Section 248, page 33 under Appeal and Error it is stated:

"In the exercise of its power to do so, an appellate Court will consider questions not raised or reserved in the trial Court when it appears necessary to do so in order to meet the ends of justice or to prevent the invasion or denial of essential rights. The Court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved, or the question is imperfectly presented."

The case of *Weems vs. United States*, 217 U. S. 349, is authority for the above statement, and in fact, it was held in the case of *Wiborg vs. United States*, 163 U. S. 632 that:

"want of evidence to sustain a verdict against some of the defendants in a criminal case may be considered as ground of reversal although no motion or request was made in the lower Court to instruct the Jury to find for them."

In the instant case, however, defendant's rights were sought to be preserved by the motion of defendant's counsel to withdraw the evidence from the consideration of the Jury and to discharge the defendant, which was done with the intent, and it would seem properly so, of objecting to the admission of, and challenging any and all evidence offered by the Government.

It is said in 47 *Am. Jur.*, Section 6, page 505, under Searches and Seizures, that the Fourth Amendment to the Federal Constitution provides that:

"the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This Amendment is stated to be a limitation upon the powers of the Federal Government.

It is stated in 47 *Am. Jur.*, Section 52, page 532:

"an unreasonable search has therefore been defined as an examination or inspection without authority of law of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or for some evidence of guilt, to be used in the prosecution of a criminal action. The essence of the offense is the invasion of a man's rights of personal security, personal liberty and private property."

Cited are the cases of *People vs. DeCesare*, 220 Mich. 417; *Weeks vs. United States*, 232 U. S. 383.

It has been held by the United States Supreme Court that search warrants may not be used as a means of gain-

ing access to a man's house or office and papers solely for the purpose of searching to secure evidence to be used against him in a criminal proceeding. *Gouled vs. United States,* 255 U. S. 298, and *United States vs. Lefkowitz,* 285 U. S. 452.

The Government had offered no evidence at the trial below of the issue or use of any search warrants or warrants for the arrest of the defendant. The two Government Agents who made the arrest and Dr. Landsborough all testified as to everything that was said and done in Dr. Landsborough's home on the day of the seizure of the morphine sulphate tablets produced in evidence. This testimony at no time referred to any search warrant or warrant for arrest. There was no conversation at the home relative thereto as is required by law.

On January 5, 1948, this Court decided the case of *United States vs. Michael DiRe,* 332 U. S. 581. The arrest and part of the search had been conducted by Officers when DiRe was seated in an automobile; was taken to the Police Station where further search disclosed counterfeit ration stamps in DiRe's clothing. At the trial, DiRe failed to move to suppress evidence and the question of unlawful search and seizure was apparently first raised in the Circuit Court of Appeals.

The Court, in Opinion by Mr. Justice Jackson, held that:

> "arrest and search without warrant where no offense is being perpetrated, or no known felony committed is illegal * * * a search is not to be made legal by what it turns up * * * the conviction based on evidence so obtained cannot stand."

Petitioner, at no time on January 20, 1947 was committing any offense, or violating any law and certainly not as charged in the indictment.

Petitioner submits that the decisions of the District Court and Circuit Court of Appeals, in the case at bar, are contrary to the opinions of this Court in the *DiRe* case,

the *Anne Johnson* case and the *Jack Trupiano* case cited above. The facts of the instant case and the *Anne Johnson* case are quite similar. In the *Johnson* case, the Narcotic Officers had likewise been informed of the use of opium in the hotel in which, when the Officers entered, they smelled burning opium. They were admitted to Anne Johnson's room where opium and smoking apparatus were found upon search by the Officers who had no warrants to search or to arrest. Anne Johnson was convicted, and successfully challenged the conviction as a violation of the rights secured to her by the Fourth Amendment to the Constitution.

In both cases, contraband was found.

In both cases, there was information leading to the later discovery.

In both cases, there were searches, arrests and seizures without the issue and use of warrants.

CONCLUSION.

This case should not have been submitted to the Jury as the legal presumption of guilt by the alleged possession of contraband was completely and effectively explained away by defendant below, Petitioner herein.

The Respondent offered no additional evidence, hence there was nothing to submit to the Jury.

The Agents had no legal authority to enter the dwelling, search and arrest, hence the Petitioner was unlawfully detained and he should then have been discharged.

The Petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

HAL H. GRISWOLD,

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Dr. Arnold M. Landsborough.

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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 190

DR. ARNOLD M. LANDSBOROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 77–80) is reported at 168 F. (2d) 486.

JURISDICTION

The judgment of the Court of Appeals was entered June 1, 1948 (R. 75), and a petition for rehearing was denied July 12, 1948 (R. 89). The petition for a writ of certiorari was filed August 2, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, now 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the Government's evidence that petitioner had possession of narcotics in an unstamped container, which circumstance is by statute made "prima facie evidence" of illegal purchase, was sufficient to take the case to the jury in view of the fact that there was defense testimony in explanation of the possession.

2. Whether petitioner is entitled to a reversal of the conviction on his objection, raised for the first time on appeal, that the agents had neither an arrest warrant nor a search warrant when they seized the narcotics.

STATUTE INVOLVED

Section 1 of the Harrison Anti-Narcotic Act, as amended (sec. 2553 (a) of the Internal Revenue Code, 26 U. S. C. 2553 (a)), provides in pertinent part:

> It shall be unlawful for any person to purchase * * * any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; * * *.

STATEMENT

Petitioner was indicted in the District Court for the Northern District of Ohio in a single

count charging him with illegal purchase of narcotics in violation of Section 1 of the Harrison Anti-Narcotic Act (R. 2). After a jury trial, he was convicted (R. 3) and sentenced to imprisonment for 15 months (R. 68). The judgment was affirmed on appeal (R. 75).

The evidence for the Government may be summarized as follows:

Petitioner is a physician, practicing in Garrettsville, Ohio, who was, up until 1945, registered to issue narcotic prescriptions. In that year, federal narcotic agents noticed that petitioner was issuing large numbers of prescriptions for unusual amounts of narcotics to one patient, Bishop. As a result of their investigation, petitioner surrendered his tax stamp and order forms, and his registration was cancelled on July 28, 1945. (R. 4–5, 26–28; cf. 18–24.)

On January 20, 1947, two federal narcotics agents, acting on information, examined the files of a drug store in Cleveland and found that Bishop, whom they knew to be a drug addict, had been purchasing narcotics there on prescriptions[1] (R. 5–6, 9, 12–13, 22–24). Setting a watch, they observed Bishop drive up to the store at about 1:00 p. m. in a car belonging to petitioner (R. 6, 8, 13). In about ten minutes Bishop returned to the car, drove 30 miles to his home in

[1] These prescriptions were issued to Bishop by another physician in Chardon, Ohio (R. 15, 17).

Garrettsville with the agents trailing, remained there a short while, and then drove down the road to petitioner's home, where he parked the car in the garage and entered the house through an entrance from the garage (R. 6–7, 9–10, 13). When Bishop came out of petitioner's house about ten minutes later, the agents questioned him and he admitted that he had brought petitioner some morphine tablets (R. 7, 13). Acting on this information, the agents, taking Bishop with them, went through the garage and walked into the kitchen where they found petitioner[2] (R. 7, 10, 13). Bishop told petitioner he had informed the agents that he had just brought him 40 morphine tablets; Bishop also said, in petitioner's presence, that he had been using petitioner's car for two months to drive to Cleveland to get narcotics, and that he had been bringing petitioner five or ten tablets of morphine every other day (R. 7–8, 13, 15). Petitioner at first denied having any drugs; he walked from the kitchen into the parlor accompanied by one of the agents, who asked him for whatever drugs he had; after some discussion, petitioner finally said, "Yes, I have some drugs"; he then walked back into the kitchen, took a small vial from his pocket and placed it on the table (R. 7, 14). The vial contained 40 quarter-grain tablets of morphine

[2] Petitioner admitted that the agents knocked on the door and that he was slow in answering it (R. 33).

sulphate[3] (R. 7–8, 14, 24–25, 28–30). Petitioner was then placed under arrest, but because of the state of his health he was permitted to remain at home that night (R. 8, 9, 14, 18). While arrangements were being made for him to report in Cleveland the next day, petitioner momentarily left the kitchen and went into his office to talk to a patient who had come in (R. 10–11, 12, 17).

The following evidence was adduced in petitioner's behalf:

Petitioner testified himself that in October 1944, at the request of Ripberger, a narcotics agent, he began to treat Bishop, who had suffered some sort of painful spinal injury; that at the time he began treatment he advised Ripberger by letter that Bishop required special surgical care which he was not qualified to perform; that he received no reply from Ripberger and then began to prescribe narcotics for Bishop; that Bishop's demands for the drug ultimately became so great that he voluntarily surrendered his narcotics tax stamp in July 1945 so as not to have to prescribe for him (R. 32, 34, 36–37, 38, 39). Petitioner also testified that he had taken morphine himself in 1945 and 1946 on the prescription of his attending physician as the result of two serious

[3] These tablets were not a part of the purchase made by Bishop in the Cleveland drug store *on that day* (R. 25). But the Government's witness did not testify, as implied in the petition (Pet. 7), that Bishop had not purchased the contents of the bottle on some previous occasion.

illnesses (R. 32–33); on cross-examination, however, he admitted prescribing narcotics for himself, and admitted having signed a statement to the effect that he started using narcotics in 1940 (R. 37–38).

Petitioner denied that he had ever received narcotics from Bishop (R. 34, 39, 44, 46, 47). In respect of the events of January 20, 1947, he testified that he had been bedridden in the hospital and at his home for several months as the result of a broken hip and that on his return from the hospital his physician prescribed morphine for him, that he intended to start for Florida shortly to recuperate, and that some days previously his physician had issued him a prescription for 50 tablets of morphine sulphate for the trip (R. 33, 35). He stated that the prescription was filled in Ravenna, Ohio, and that someone in his household had, unknown to him, removed the tablets from the cardboard box in which they had been dispensed and placed them in a glass vial to prevent breakage in travelling (R. 35, 43, 45). Petitioner also testified that Bishop had been taking care of the furnace in his home during his illness and that was the reason for Bishop's visit on January 20, 1947 (R. 36, 47). He said that when the agents first entered the kitchen that day they asked him whether he had any legal narcotics on prescription; he replied that he had, but that he did not know where they were (R. 35, 42, 43). At that moment a patient

entered the office and he excused himself and walked through the house to the office (R. 33–34, 42–43). There he noticed the vial containing the morphine tablets lying on a table; not knowing what it was, but thinking that it should not be lying there, he picked it up and put it in his pocket (R. 34, 35, 41, 42–43). He said that when he returned to the kitchen the agents started to search him, so he took the vial out of his pocket and put it on the table without comment (R. 34, 42, 44, 45).

Petitioner's wife testified that his physician prescribed 50 tablets of morphine sulphate for the trip to Florida; that she had the prescription filled in a store in Garrettsville; that she transferred the tablets from the cardboard box to the vial to prevent breakage; and that she left the vial on the table in the office (R. 49–50). On cross-examination she stated that she had not kept the cardboard box (R. 53). She admitted that she had used narcotics herself and that she had signed a medical addict's report (R. 52, 54). She also admitted that she knew Bishop was an addict (R. 55).

ARGUMENT

1. At the end of the Government's case, and again at the close of all the evidence, petitioner moved for a directed verdict on the ground that the evidence for the prosecution failed to establish an illegal purchase (R. 30–31, 59–60). Peti-

tioner contends that it was error to deny the motion; he argues that although evidence of possession of unstamped narcotics gives rise under the statute to a presumption of illegal purchase, the presumption alone is insufficient to support a conviction where the defendant presents uncontradicted evidence reasonably tending to explain the fact of possession (Pet. 5, 7–10).

In the first place, however, the fact of possession did not stand alone in the case, and it is not true, as stated in the petition (Pet. 7), that there was "not one word of testimony offered at the trial by the United States relating to the source of the morphine sulphate tablets in question." In addition to the fact that petitioner had possession of the unstamped morphine, there was evidence that Bishop was an addict (R. 22); that Bishop used petitioner's car to make regular trips to Cleveland to purchase drugs for himself (R. 15; cf. 9); that Bishop brought 5 or 10 tablets of morphine to petitioner every other day (R. 15); and that Bishop brought petitioner 40 tablets on this particular day (R. 13). Consequently there was evidence to support the conclusion that petitioner received the morphine from Bishop in consideration for the use of his car.[4]

[4] The conclusion is further supported by petitioner's admission that he had paid money to Bishop (R. 45). Petitioner explained that this was for Bishop's services in caring for the furnace (R. 47). But the jury were not bound to accept this explanation.

But even if the fact of possession stands alone in the Government's case, the defendant is not entitled to a judgment of acquittal simply because he presents some explanation in rebuttal of the Government's prima facie case. The proffered explanation must be clear, candid, and unimpeached, so that the jury would have no basis for disbelieving it. The circuit courts of appeals have frequently upheld convictions under the Harrison Act resting upon the mere fact of possession, in the absence of a credible and unimpeached explanation. See, e. g., *Goode* v. *United States,* 149 F. (2d) 377 (App. D. C.); *Stobble* v. *United States,* 91 F. (2d) 69 (C. C. A. 7); *Acuna* v. *United States,* 74 F. (2d) 359 (C. C. A. 5); *Gowling* v. *United States,* 64 F. (2d) 796, 798 (C. C. A. 6); *Davis* v. *United States,* 16 F. (2d) 778 (C. C. A. 5); and cf. *Ezzard* v. *United States,* 7 F. (2d) 808, 812 (C. C. A. 8). This Court has stated the requirements for rebuttal of a presumption in terms of "clear, distinct and convincing proof" (*Fresh* v. *Gilson,* 16 Pet. 327, 331); "ascertained and established facts" (*Lincoln* v. *French,* 105 U. S. 614, 617); "substantial proof" (*New York Life Insurance Co.* v. *Gamer,* 303 U. S. 161, 170). See also *Mobile, Jackson and Kansas City R. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43; *Commercial Molasses Corp.* v. *New York Tank Barge Corp.,* 314 U. S. 104, 111. The expressions in these cases presuppose that normally

the question whether an uncorroborated presumption has been rebutted is one for the jury. In *Davis* v. *United States,* 160 U. S. 469, a criminal case, where the defense was insanity and the Government relied solely upon the presumption of sanity, this Court discussed the quantum of evidence necessary to rebut the presumption. The underlying assumption, again, was that the jury could find the defendant sane on the basis of the presumption alone, despite defense testimony to the contrary. We think that Congress certainly intended that the presumption under the Harrison Act should remain in the case unless rebutted by clear, candid, and unimpeached testimony. For such presumptions are created to meet the exigencies of normally incriminating situations where, as here, the prosecution usually cannot produce direct evidence of a violation of law and the defendant, who knows the truth, has it within his power to explain the suspicious circumstances and bring the truth to light. If the defendant is to be allowed to rebut the presumption by any explanation, however incredible, in a situation where the prosecution cannot normally produce evidence, to what point did Congress create the presumption?[5]

As will be noted from the summary of the evidence set forth in the Statement (*supra,* pp.

[5] See the exhaustive treatment of this point in our brief in *Tot* v. *United States*, No. 569, O. T. 1942, pp. 9–30.

3–7), petitioner's explanation of his possession was contradicted in important respects by the Government's evidence. For example, petitioner denied that he had ever received narcotics from Bishop; the Government's evidence showed that Bishop brought him morphine every other day. Petitioner said he obtained the 40 tablets in the vial on a prescription; the Government witnesses testified that Bishop said in petitioner's presence that he had just delivered them to him. Petitioner testified that he picked up the vial when he went to the office to see a patient; the Government witnesses testified that petitioner had already surrendered the vial before the patient arrived. Furthermore, the credibility of petitioner's wife was impeached. Petitioner testified that his alleged prescription for 50 tablets of morphine was filled in Ravenna; his wife said it was filled in Garretsville. Both petitioner and his wife admitted that they used narcotics. And one of the witnesses who testified to petitioner's good reputation admitted on cross-examination that it was common gossip in Garretsville that petitioner was addicted to the use of narcotics. We think it is manifest, therefore, that the evidence was not such as to require the trial court to direct an acquittal.

2. Petitioner also contends that his conviction should be reversed because the record fails to show that the officers had either a warrant for

his arrest or a search warrant (Pet. 5–6, 10–13). This point was not raised in the trial court and it is an obvious afterthought occasioned by three recent decisions of this Court cited by petitioner (Pet. 12–13).

It is settled that an objection on this score must be raised at or before trial. *Segurola* v. *United States*, 275 U. S. 106, 111; Rule 41 (e), F. R. Crim. P.[6] Petitioner certainly had ample opportunity to raise the issue in the trial court, for he knew all the circumstances whereby the officers obtained the narcotics from his possession. The mere absence of evidence in the record as to a warrant does not necessarily mean that the officers were without one. A timely motion would have revealed the facts, and petitioner, having ignored the opportunity, cannot now be heard to say that the obtention was illegal.[7]

Furthermore, even on the supposition that the agents had no warrant of any kind, there was no illegal seizure. The agents clearly had reasonable cause to believe that a felony had been com-

[6] "* * * The motion [to suppress evidence] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

[7] Petitioner's reliance on *Weems* v. *United States*, 217 U. S. 349, and *Wiburg* v. *United States*, 163 U. S. 632, which hold that this Court will notice an unpreserved error which infects the whole trial with unfairness, is clearly misplaced since there was no error here.

mitted for they were told by Bishop that he had just given 40 tablets of morphine to petitioner. They entered, apparently to question petitioner, and he surrendered the drugs to them when he saw that they already knew he had them. There was no search and no seizure. Petitioner's reliance on *United States* v. *DiRe,* 332 U. S. 581, *Johnson* v. *United States,* 333 U. S. 10; and *Trupiano* v. *United States,* 334 U. S. 699, is therefore unavailing.

CONCLUSION

The decision of the Court of Appeals is correct and no conflict is involved. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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